Summa Corporation d/b/a Frontier Hotel *and* General Sales Drivers, Delivery Drivers and Helpers, Local #14, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 31-RC-3680

November 9, 1982

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered objections in an election held on February 7, 1981,[1] and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings and recommendations.[2]

The Employer has moved that the Board order the Regional Director to transmit to the Board and to the parties the record of his investigation in this case. The Employer contends that without the "full investigative record" the Board has a clearly inadequate record upon which to rule on the Employer's exceptions. We disagree. For the reasons set forth below, we find the record before us contains all of the documents necessary and relevant for our determination of the issue before us.

Several court decisions[3] have criticized the Board's Rules and Regulations which limit the record on review in objections cases where no hearing was held. Those courts perceived an ambiguity in our rules regarding what materials are to be included in the record and who has the responsibility of forwarding those materials to the Board. We have recently responded to those decisions in our amendments to the Board's Rules and Regulations (46 Fed. Reg. 45922, September 9, 1981), restating and clarifying Sections 102.68 and 102.69.

As now clearly set out in our Rules and Regulations, the record in objections cases where no hearing is held consists of the objections which were filed, the regional director's report or decision, all documentary evidence, except statements of witnesses, relied upon by the regional director in his report or decision, any briefs or other legal memorandums submitted by the parties, and any other motions, rulings, or orders of the regional director. Section 102.69(g)(1)(ii).

Statements of witnesses are expressly excluded from the record in accord with our policy, upheld by the Supreme Court in *N.L.R.B.* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), of protecting investigatory affidavits from disclosure when the witnesses who gave them have not testified at a hearing. As the Supreme Court recognized, lack of confidentiality of witness statements would "have a chilling effect on the Board's sources [of information]," not only because of fear of economic retaliation, but also "from an all-too-familiar unwillingness to 'get too involved' unless absolutely necessary." *N.L.R.B.* v. *Robbins Tire & Rubber Co.*, 437 U.S. at 239-241. Notwithstanding our policy of protecting affidavits from disclosure, we have now plainly provided that if a party wishes the Board to consider any documentary evidence, including affidavits, which it has timely submitted to the regional director, but which are not attached to the regional director's report or decision, such evidence may be appended to the party's exceptions or opposition. Once appended, those affidavits, or other documentary evidence, become part of the record and are fully considered by the Board. Section 102.69(g)(3). By this method the parties have the opportunity to supplement the record before the Board with any and all documents previously submitted to the regional director which have not been forwarded to the Board.

This procedure is fully consistent with the burden of proof to be met by the objecting party in post-election cases, including the review stage of such proceedings. The burden is on the objecting party to demonstrate to the Board that the evidence it submitted to the regional director, if credited, would warrant setting aside the election, and that the regional director in the decision overruling the objections resolved substantial and material issues of fact without conducting a hearing. In the absence of such a demonstration we are entitled to rely on the regional director's report or decision, for the material facts in such circumstances are undisputed.[4] See *N.L.R.B.* v. *Belcor, Inc.*, 652 F.2d 856, 859 (9th Cir.); *N.L.R.B.* v. *Eskimo Radiator Mfg.*, 668 F.2d 1315 (9th Cir. 1982); *N.L.R.B.* v. *Tennessee Packers, Inc., Frosty Morn Division*, 379 F.2d 172, 178 (6th Cir. 1967), cert. denied 389 U.S.

[1] The election was conducted pursuant to the Order Vacating Decision and Order, Rescinding Certification and Remanding Proceeding to the Regional Director for a Second Election issued by the National Labor Relations Board on December 31, 1980, a Notice of Second Election issued by the Acting Regional Director for Region 31 on January 14, 1981, and a Stipulation for Certification Upon Consent Election. The tally was 160 ballots for, and 68 ballots against, the Petitioner; there were no challenged ballots.

[2] In the absence of exceptions thereto, the Board adopts *pro forma* the Regional Director's recommendation to overrule Objections 1, 4, and 5.

[3] See, e.g., *Prestolite Wire Division* v. *N.L.R.B.*, 592 F.2d 302 (6th Cir. 1979); *N.L.R.B.* v. *The Cambridge Wire Cloth Company, Inc.*, 622 F.2d 1195 (4th Cir. 1980); *N.L.R.B.* v. *Klingler Electric Corporation*, 656 F.2d 76 (5th Cir. 1981); *N.L.R.B.* v. *Belcor, Inc. d/b/a San Jose Care & Guidance Center*, 652 F.2d 856 (9th Cir. 1981); *N.L.R.B.* v. *Consolidated Liberty, Inc.*, 672 F.2d 788 (9th Cir. 1982).

[4] If in his investigation the regional director uncovered evidence which conflicts with the objecting party's evidence and if such conflict involves a substantial or material issue, then the regional director must order a hearing. Sec. 102.69(d).

958; *Reichart Furniture Company* v. *N.L.R.B.*, 649 F.2d 397 (6th Cir. 1981). Thus, a regional director's determination that a hearing is unnecessary is a finding that there are no substantial and material issues presented, and our adoption or rejection of this determination rests solely on whether the objecting party has identified evidence to the contrary. Otherwise, the Board would be required to assume the objecting party's burden and conduct a "fishing expedition" into the investigatory file for evidence which the objecting party has failed to identify. For these reasons, our rules regarding exclusion of employee affidavits from the record cannot constitute denial of due process to the objecting party.

This procedure is essential to our policy of expeditiously resolving questions concerning representation. See, e.g., *Trustees of Boston University*, 242 NLRB 110, fn. 4 (1979). Since our rules require a hearing only in cases in which material facts are in dispute, hearings in all other cases would waste time, money, and effort for all concerned, while unduly delaying resolution of the question concerning representation and unjustifiably denying unit employees their right to have their election choice implemented through the appropriate certification.

In sum, the failure of the objecting party to demonstrate that substantial or material factual issues exist warrants the Board's disposition of the issues without a *de novo* review of the entire investigative file. See Section 102.69(d); *N.L.R.B.* v. *Eskimo Radiator Mfg., supra; N.L.R.B.* v. *Belcor, Inc., supra; Reichart Furniture Company* v. *N.L.R.B., supra; Revco D.S., Inc. and/or White Cross Stores, Inc., No. 14* v. *N.L.R.B.*, 653 F.2d 264 (6th Cir. 1981).

Here, we find, in agreement with the Regional Director, that the Employer has presented insufficient evidence to establish a *prima facie* case of objectionable election interference.[5] The Regional Director accepted as true the facts most favorable to the Employer and concluded that the Employer's objections lacked merit. Although the Employer's exceptions take issue with the legal conclusions the Regional Director drew from the facts, after consideration of the Regional Director's report in light of the Employer's exceptions and supporting evidence attached thereto, we agree with the Regional Director's conclusion for the reasons stated in his report. Since none of the Employer's objections raise substantial or material factual issues, no evidentiary hearing is warranted. Accordingly, we adopt the Regional Director's findings and recommendations and certify the Petitioner.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for General Sales Drivers, Delivery Drivers and Helpers, Local #14, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All gaming casino dealers, shills, Keno writers and Keno runners employed by the Employer at its facility located at 3120 Las Vegas Boulevard South; excluding all other employees including casino shift managers, assistant shift managers, pit bosses, pit floormen, boxmen, slot shift supervisors, floormen, slot mechanics, booth cashiers, change girls, casino cage cashiers, slot cage cashiers, coin counters and wrappers, pit clerks, credit clerks, office clerical employees, guards and supervisors as defined in the Act.

[5] We have in fact considered all of the relevant evidence in this case which was before the Regional Director. In accordance with Sec. 102.69(g) the Regional Director attached to his report the documentary evidence, excluding statements of witnesses, upon which he relied in his report, and the witness statements submitted to the Regional Director by the Employer and relied on by the Regional Director were appended to the Employer's exceptions. Such evidence, therefore, is part of the record as defined in Sec. 102.69(g) and we have fully considered it. Accordingly, the Employer has clearly suffered no prejudice. See *N.L.R.B.* v. *Belcor, Inc.*, 652 F.2d 856, 858 (9th Cir. 1980); *N.L.R.B.* v. *Eskimo Radiator Mfg.*, 688 F.2d 1315, 1316 (9th Cir. 1982).